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SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 949

W. H. MORAND AND WIFE, MARGARET OLIBENE MORAND,
Appellants

v.

CITY OF RALEIGH, NORTH CAROLINA, *Appellee*

On Appeal from the Supreme Court of the State of North Carolina

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraph 1 (b) of the Revised Rules of this Court, appellee, City of Raleigh, North Carolina moves that the appeal from the Supreme Court of the State of North Carolina be dismissed, or that the judgment of said Court be affirmed.

STATEMENT OF ISSUES ON APPEAL

This is an appeal from a judgment entered December 11, 1957 by the Supreme Court of the State of North Carolina upholding an injunction restraining the appellants from continued violation of the zoning ordinances of the City of Raleigh, North Carolina. The injunction re-

strained the defendants from operating a trailer camp or park on their property in an area zoned solely for residential use. This injunction was issued June 11, 1957 by the Superior Court of Wake County, North Carolina, following a hearing and was based upon findings of fact that the City of Raleigh, pursuant to North Carolina law, had extended its zoning jurisdiction one mile beyond its corporate limits, that the property of the appellants lay within this one-mile zone, that the appellants were operating a trailer camp or park on their property in violation of an existing zoning ordinance of the City of Raleigh, and that such use was commenced by the appellants after the adoption and effective date of the ordinance prohibiting such use.

The appellants thereafter appealed as of right to the Supreme Court of the State of North Carolina. That Court affirmed the judgment of the Superior Court without mention of any constitutional questions, state or federal, in its opinion. 247 N. C. 363, 700 S. E. 2d 870. The Court further noted that, since the appellants had not excepted to any findings of fact, the findings were binding on the appeal. The questions before the North Carolina Supreme Court were (1) Do the facts found support the conclusions of law and the judgment entered thereon, and (2) Does any error appear upon the face of the record? (Statement as to Jurisdiction, page 14).

ARGUMENT

I. The Attempted Appeal Should be Dismissed for Failure to Present Properly a Federal Question

The appellants in their Statement as to Jurisdiction contend that the North Carolina Supreme Court necessarily ... ed upon the federal constitutional question said to be found in this case. The record, the briefs and the opinion of the North Carolina Supreme Court all refute this statement.

The appellants in their answer filed in the Superior Court of Wake County, the court of original jurisdiction, failed to specify what clause, if any, of the United States Constitution was allegedly violated by the zoning ordinance. Their answer contained two separate paragraphs alleging that the zoning ordinance was (1) discriminatory "and in violation of the Constitution of the United States" and (2) deprived them of their property without due process of law "in violation of the Constitution of the United States." (State Record, pages 8 and 9).

These two catch-all references to the United States Constitution are the only ones to be found in the pleadings.

The Judge of the Superior Court in his opinion granting the requested injunction *did not* mention the federal constitutional question said to be lurking in this case. (State Record, pages 10 and 11).

In their appeal to the North Carolina Supreme Court, the appellants filed a thirteen-page brief in support of their arguments against the enforcement of the ordinance in question. They set out in detail their contentions based upon the Constitution of the State of North Carolina. But no cases were cited and no argument was made based upon the Constitution of the United States. Finally in the last paragraph of their argument, appellants contended that the ordinance in question deprived the defendants "of the equal protection of the laws guaranteed by the 14th Amendment of the Constitution of the United States."

The Supreme Court of the State of North Carolina, in view of the pleadings herein and the arguments before it, affirmed the trial court without once referring to the Constitution of the United States, or to any federal constitutional question hidden in the case. (Appellants' Statement as to Jurisdiction, pages 13-15).

In this case, as in many others, a broadside attack upon a state act (or city ordinance) has been made upon the ground that it is in violation of the United States Constitution. This Court in the exercise of its appellate jurisdiction from the highest courts of the various states has consistently dismissed such appeals as lacking a federal question. *Herndon* v. *Georgia*, 295 U. S. 441, 442 (1935). A mere reference to the "Constitution of the United States" or to "due process of law" lays no basis for an appeal to this Court. *Herndon* v. *Georgia*, 295 U.S. 441, 442-3; *Harding* v. *Illinois*, 196 U. S. 78, 88; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248; *Oxley Stove Co.* v. *Butler County*, 166 U.S. 648; *Bowe* v. *Scott*, 233 U.S. 658, 664-5.

In this case there is nothing more than a mere allegation that the enforcement of a municipal ordinance violated the defendants' rights under the federal constitution. If such an allegation, without a State Court ruling on the alleged constitutional question, is sufficient to invoke this Court's appellate jurisdiction under 28 U. S. C. 1257 (2), then any and all state court cases can be made appealable to this Court by simply adding a standard clause to every pleading.

Furthermore, where a State Supreme Court has not passed upon a federal question, and the record does not disclose what federal question, if any, was before the state court, this Court on appeal has refused to consider the federal question. *Northwestern Bell Telephone Co.* v. *Nebraska State Railway Commission*, 297 U. S. 471 (1936); compare *McGoldrich* v. *Compagnie Generale*, 309 U. S. 414, 434 (1940).

II. It Is Manifest That the Question on Which the Decision of the Case Depends Is So Unsubstantial As Not to Need Further Argument

The Federal question which the appellants are seeking to have this Court review is unsubstantial. This Court's decision in *Euclid* v. *Ambler Realty Company*, 272 U. S. 365

(1926) settled the question that municipal zoning ordinances regulating land use are within the state's police power and do not violate the Fourteenth Amendment.

This decision has been consistently followed in this Court. *Zahn* v. *Board of Public Works*, 274 U. S. 325 (1927); *Gorieb* v. *Fox et al.*, 274 U. S. 603 (1927), and in state courts and lower federal courts. 58 American Jurisprudence 947, 948; 54 ALR 1016; 86 ALR 659; 117 ALR 1117 and cases cited.

Appellants contend that this case presents a novel question because the zoning authority is exercised by a municipal board beyond the territorial limits of the municipality. The North Carolina Supreme Court expressly upheld the ordinance in question against this attack. (Statement as to Jurisdiction, page 16). This question relates solely to North Carolina law, and presents no federal constitutional issue.

Appellants further contend that this case does not relate to the extra-territorial effect of municipal jurisdiction for sanitary or police purposes, but solely to regulation of land use for esthetic considerations. (Statement as to Jurisdiction, page 10).

The short answer to this contention is that the record contains no such findings of fact, and the appellants have not excepted to the findings of fact made by the trial judge. On the contrary, the Court below could well have taken judicial notice that trailer camps can indeed create problems of sanitation and fire protection, and that a municipality of necessity must regulate such hazards on its borders.

The appellants have failed to show that the City of Raleigh zoning ordinance in question constitutes such an unreasonable or discriminatory abuse of the state's police power as to deprive them of their property without due process of law and in violation of the Fourteenth Amend-

ment to the Constitution of the United States. *Euclid* v. *Ambler Realty Company*, 272 U. S. 365; *Zahn* v. *Board of Public Works*, 274 U. S. 325.

The appellee submits that the questions presented in this appeal has long ago been so definitely determined that no substantial question is presented by this appeal entitling appellants to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore, appellee respectfully moves that the within appeal be dismissed, or that the judgment and decree of the Supreme Court of the State of North Carolina be affirmed.

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